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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>RICHARD VERDUGO,<br>Defendant and Appellant. | D070727<br><br>(Super. Ct. No. SCD261524) |

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed as modified.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A few weeks after robbing a delivery person of medical marijuana, Richard Verdugo unsuccessfully attempted to burglarize a medical marijuana store by using a

propane torch to soften the locked metal door so he could pry it open with a crowbar. A jury convicted Verdugo of robbery, arson, attempted burglary, related drug and weapons charges, and resisting arrest. Outside the jury's presence, Verdugo admitted a serious felony prior conviction which is a strike prior. The court sentenced Verdugo to 26 years in prison.

On appeal, Verdugo contends (1) insufficient evidence supports the arson conviction because the metal structure did not burn—only the paint on the door and door frame burned; (2) under Penal Code[1] section 654, the court erred in sentencing him for both arson and attempted burglary; (3) his conviction on count 10 for possessing marijuana for sale in violation of Health and Safety Code section 11359 should automatically be reduced to a misdemeanor based on a postsentencing statutory amendment (Proposition 64) that reduced the penalty for that crime; and (4) the court erred in imposing a $97,200 restitution fine and parole revocation fine because each exceeds the maximum $10,000 under section 1202.4, subdivision (b)(1).

The Attorney General concedes (1) the court should have stayed Verdugo's sentence for attempted burglary under section 654, and (2) the restitution and parole revocation fines should be reduced to the $10,000 statutory maximum.

We agree with the Attorney General's concessions, reject Verdugo's other assertions of error, and modify the judgment to correct the sentencing errors and affirm as

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1 All statutory references are to the Penal Code unless otherwise specified.

so modified. On remand, Verdugo may file a petition in the superior court seeking resentencing on count 10 under Health and Safety Code section 11361.8.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The People's Case*

#### 1. *Count 1: Robbery*

In March 2015 Keith M. was working as a delivery person for SoCal Holistic Health (SoCal), a medical marijuana business. Previously, SoCal operated from a physical location; however, by March 2015 it was only making deliveries.

On March 12, 2015, SoCal instructed Keith M. to deliver marijuana to Verdugo at an address on 32nd Street in San Diego. Keith M. knew Verdugo because he had seen Verdugo "a handful" of times shopping inside the SoCal store.

A SoCal manager provided Keith M. with marijuana for the delivery, consisting of different cannabis flowers, concentrates, and edibles worth between $3,000 and $4,000. Keith M. put the products in two laptop bags, and he telephoned Verdugo between 8 and 9 p.m. to arrange a place and time to meet.

Verdugo answered the telephone. Keith M. said, "Hey, I'm on my way" and drove to the specified address on 32nd Street.

When Keith M. arrived he knocked on the front door. The house was dark and unoccupied. As Keith M. was about to leave, two men approached him. One demanded Keith M.'s telephone and laptop bags. Keith M. recognized Verdugo as one of these men.

Trying to escape, Keith M. held onto the laptop bags and jumped over a fence. But the two men pursued, pinned him down injuring his knees, took the laptop bags filled

with the marijuana, and ran off. At trial, Keith M. testified he was "positive" and "certain" Verdugo was one of the robbers.

2. *Counts 2 - 7: Firearm and drug possession on April 7, 2015*

About three weeks later, on April 7, 2015 at about 1:40 a.m., San Diego police officers Timothy Arreola and his partner, Eric Jones, were on patrol when they saw a 1994 Ford Explorer ahead of them with a partially obstructed license plate. The officers initiated a traffic stop. When the vehicle stopped, the passenger in the left rear seat—Verdugo—pushed the door open and tried to "quickly exit the car."

Officer Arreola ordered Verdugo to get on the ground; Verdugo complied. Arreola was familiar with Verdugo and knew Verdugo was then on parole from state prison.[2] He did not know Verdugo was wanted for the March 15 robbery of Keith M.

After securing the three other occupants of the Explorer, police searched the vehicle. They found a loaded .25-caliber semi-automatic handgun under the front seat, with four rounds in the magazine and one in the chamber. This gun was within Verdugo's reach inside the vehicle.

In the glove compartment, Officer Arreola found a Glock magazine containing three .40 caliber rounds. In a crease between the rear seats, he found a .40-caliber

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[2] At trial, Verdugo stipulated that before March 12, 2015, he was convicted of a felony and on March 12, 2015, was on parole.

semiautomatic handgun with an unloaded magazine inside. This gun was also accessible to Verdugo inside the vehicle.[3]

In the rear of the Explorer, Officer Arreola found a backpack belonging to the driver. Inside the backpack were two containers of concentrated cannabis.

Police arrested Verdugo on April 7, 2015. He was arraigned on April 9, posted $100,000 bail, and was released from custody.

3. *Counts 8-13: Arson, attempted burglary, and other offenses on April 25, 2016*

Outliers Collective (Outliers) is a medical marijuana dispensary in El Cajon. The building, including the exterior door and doorframe, is metal. The door is painted. Outliers is protected by a silent alarm and exterior surveillance cameras.

On April 25, 2015, at approximately 2:45 a.m., an alarm company notified the San Diego County Sheriff's Department that a front door motion alarm had been triggered at Outliers. Deputy Tony Bailey was near the area and responded. As he arrived at the Outliers parking lot, he saw a car parked on the dirt shoulder, about 200 yards away. That car, a silver Ford Taurus occupied by three men wearing black beanies, slowly drove past him.

Deputy Bailey radioed for other deputies to follow the Taurus while he checked Outliers. At Outliers, Deputy Bailey saw the front door had "a large black mark on the gray paint" near the lock; it looked like it had been burned.

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[3] A police biologist tested the two guns and the Glock magazine for DNA. Verdugo was excluded as a possible major contributor.

After quickly assessing the scene, Deputy Bailey could still see the Taurus on the roadway, so he returned to his marked police car to intercept it. He pulled the Taurus over about a half mile from Outliers. Verdugo was the front passenger, but he falsely identified himself to Deputy Bailey as "Jose Montes."

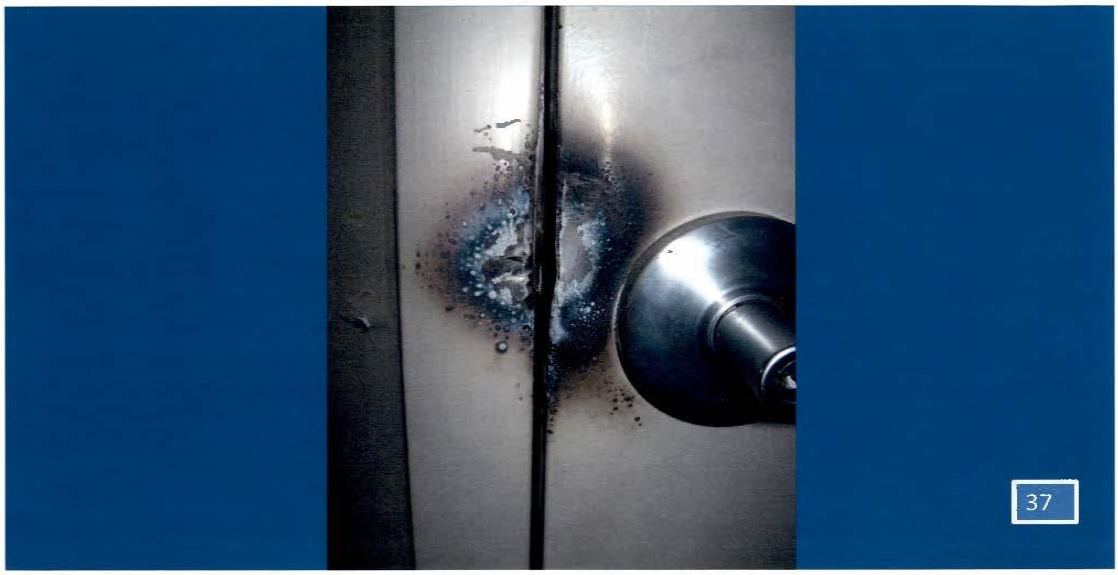
Inside the Taurus deputies found latex gloves and two baggies of marijuana in a compartment in the driver's side door. There were two crowbars on the car's floor. On the front passenger seat floor, Deputy Bailey found a propane bottle attached to a hose and a torch. In the trunk, Deputy Bailey found two more propane bottles and a black hose with another torch.

Inside the Taurus's trunk, Deputy Bailey found a shoebox containing a large jar filled with marijuana. The amount of marijuana was well in excess of a usable amount for one person. A laundry sack in the trunk contained more jars of marijuana, candy infused with marijuana, a pair of bolt cutters, and a pair of wire snips.

There were 148.67 grams of marijuana in the glass containers, which is enough marijuana for about 80 joints. A San Diego police detective, Eric Pollum, testified that based on the labeling of the marijuana, its packaging, and quantity, it was possessed for sale.

At around 6 a.m. that same day, Samuel B., the owner of Outliers, arrived in response to the alarm company's call. He saw "the paint had been burned around the area of the lock" and the would-be burglars had "taken a pry bar of some type and tried to pry the door open."

Samuel B. also testified the door was damaged by a "pry bar piece of metal," and the "entire area" near the lock "had been pried with a bar." Asked, "And the damage to the door frame, could that just be cleaned off?", Samuel B. testified, "No." Asked, "The actual paint was burned?", he testified, "Correct." Samuel B. authenticated a photograph of damage to the metal door and frame, exhibit 37 printed below. It shows the heat from the torch "bubbled" and "burned" the paint on the door and door frame.




Without objection, Deputy Bailey testified the heat generated by the propane torch caused the bubbling and would "soften up this steel or this metal on both sides enough to where it could—they could try and pry it open." He testified the metal appeared to be

softened because it "looked abnormal down near the bottom near that door latch" and was consistent with using a crowbar to widen the door at the doorknob itself.

Surveillance cameras at Outliers recorded the attempted burglary. The jury watched the video at trial. At one point in the recording, Verdugo is holding a propane tank with the flame touching the door.

4. *Count 14: Resisting arrest on April 26, 2015*

The next evening, April 26, 2015, Officer Arreola was on patrol and responded to a complaint about loud music. He saw Verdugo inside a parked vehicle. Knowing that Verdugo was on parole, Officer Arreola detained him and searched his car. Although police found nothing illegal in the car, Officer Arreola arrested Verdugo for a parole violation. Verdugo became upset, stating the arrest was "bullshit" and "[y]ou're going to have to beat my ass in order to take me in." Verdugo stiffened his upper body and Officer Arreola was required to overpower Verdugo to arrest him.

B. *The Charges*

The San Diego County District Attorney filed an information charging Verdugo with robbery (count 1; § 211); possession of a firearm by a felon (counts 2 & 3; § 29800, subd. (a)(1)); possession of a concealable firearm by a person previously convicted of a violent felony (counts 4 & 5; § 29900, subd. (a)(1)); possession of marijuana for sale (counts 6 & 10); Health & Saf. Code, § 11359); transportation of more than 28.5 grams of marijuana (counts 7 & 11; Health & Saf. Code, § 11360, subd. (a)); arson of a structure (count 8; § 451, subd. (c)); attempted burglary (count 9; §§ 664 & 459); possession of burglary tools (count 12; § 466); giving false information to a peace officer

(count 13; § 148.9, subd. (a)); and resisting an officer in the performance of his duties (count 14; § 148, subd. (a)(1)). The People also alleged that Verdugo committed the crimes charged in counts 8 through 11 while out on bail (§ 12022.1, subd. (b)), and that Verdugo had served two prior prison terms (§§ 667.5, subd. (b), 668); had one prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and one prior strike conviction (§§ 677, subds. (b)-(i); 1170.12, 668).

C. *The Defense Case*

Verdugo testified he had a medical marijuana card, but never purchased from SoCal. He denied robbing Keith M. and testified he had never seen him until trial.

Verdugo testified that on April 7, 2015, at around 1:30 a.m. he planned to go to a liquor store to buy some alcohol. He saw a friend driving by and, by "coincidence," the friend parked his Ford Explorer in front of the liquor store. Verdugo testified he got in the back seat for a ride home and did not see or know of any guns in that vehicle.

Verdugo admitted he tried to burglarize Outliers. He testified he used a propane torch to heat the door in an attempt to break in and steal the marijuana inside. He admitted the paint on the door was burned. He also admitted possessing burglary tools and resisting arrest.

Verdugo testified he did not know any drugs were in the Taurus, other than a small quantity of marijuana he had for personal use. He stated he did not possess any drugs he planned to sell. Verdugo denied giving a false name to police and testified he had no memory of the attempted burglary at Outliers because he was under the influence of drugs and alcohol at the time and "blacked out."

D. *Verdict and Sentencing*

The jury found Verdugo not guilty of counts 6 and 7, possession of marijuana for sale and transporting more than 28.5 grams of marijuana with respect to the April 7, 2015 car stop and search of the Ford Explorer. The jury found Verdugo guilty of all the other counts and returned true findings on the accompanying allegations.

At sentencing, the court noted that for the past 15 years, Verdugo "has engaged in acts of violence in and out of custody." The court added, "He committed the instant offense while on parole and out on bail. The prior crime and the current crime involved acts of violence and serious danger to the public . . . ."

The court sentenced Verdugo to prison for a total term of 26 years as follows: For the robbery conviction in count 1, the court selected the upper term of five years because of the "violence involved, the extensive planning and the sophistication of the crime." The court doubled that sentence to 10 years because of the strike prior. For the unlawful firearm possession convictions in counts 2 and 3, the court imposed consecutive terms of one year four months each (one-third the midterm of two years, doubled to four years with the strike prior). Under section 654, the court imposed and then stayed a four-year sentence on each of counts 4 and 5 for possession of a concealed firearm. On count 8 (arson), the court imposed a consecutive term of two years eight months (one-third the midterm of four years, doubled to eight with the strike) The court imposed a consecutive term of eight months for the attempted burglary conviction in count 9 (one-third the

midterm of one year, doubled to two years with the strike).[4] On counts 10 and 11, unlawful possession and transportation of marijuana respectively, the court imposed and stayed a sentence of one year four months on count 10 and imposed a two-year consecutive sentence on count 11 (one-third the midterm of three years, doubled to six years because of the strike).

On the misdemeanor convictions on counts 12 through 14, the court imposed a sentence of 909 days local custody with credit for time served of 455 actual days and 454 section 4019 credits.

The court added two years for the on-bail enhancement, five years for the prior serious felony enhancement, and one year for one of the prison priors.

In addition to various fines and assessments, the court imposed a restitution fine and a parole revocation fine of $97,200 each.

## DISCUSSION

### I. *THE ARSON CONVICTION IS SUPPORED BY SUFFICIENT EVIDENCE*

#### A. *Verdugo's Contention*

Under section 451, "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns . . . any structure . . . ." Verdugo contends his arson conviction should be reversed because there is "insufficient evidence to support the 'burning' element for that offense since the evidence showed only that paint had bubbled

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[4] On this count 9, attempted burglary, the abstract of judgment erroneously states the section violated as "664/211." It should be "664/459."

and the door was discolored but not otherwise damaged from the application of the torch."

B. *The Standard of Review*

Where a defendant challenges the sufficiency of the evidence supporting a conviction, our task is to review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) It is not our function to reweigh the evidence (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206) and reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

C. *The Burn Element*

The court instructed the jury that the "burn" element of arson is satisfied if the fire "damage[s] or destroy[s] . . . either all of part of [the property], no matter how small the part." (CALCRIM No. 1515.)[5] In a case involving a wood structure, if the wood "is charred in a single place, so as to destroy any of the fibers of the wood, this is a sufficient

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5 CALCRIM No. 1515 provides in part: "To prove that the defendant is guilty of [arson], the People must prove that: [¶] 1. The defendant set fire to or burned [or counseled, helped or caused the burning of a structure]; AND [¶] 2. [He] acted willfully and maliciously. [¶] To set fire to or burn means to damage or destroy with fire either all or part of something no matter how small the part."

In addition to this part of CALCRIM No. 1515, at Verdugo's counsel's request, the court also instructed with CALJIC No. 14.91, which states: "The mere blackening of property by smoke is not a burning. A charring which destroys any of the material is a burning."

burning." (*People v. Haggerty* (1873) 46 Cal. 354, 355 (*Haggerty*).) In a case involving a material that does not ordinarily burn, for example, marble—if the marble is disintegrated, or buckled, or cracked, or chipped by the heat of a fire, this is sufficient to satisfy the burn element. (*People v. Mentzer* (1985) 163 Cal.App.3d 482, 484-485.)

Mere singeing, smoking, scorching, or discoloration from heat does not satisfy the "burn" element. (*Haggerty, supra*, 46 Cal. at pp. 354-355.) Rather, the property, even the smallest part of it, must be ruined by fire, though it is not required to be "'reduced to ashes.'" (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 166 (*Jesse L.*).) In short, to satisfy the "burn" element, the fire must compromise, even very slightly, the physical integrity of even the smallest part of the material at issue.

The courts in *Jesse L., supra*, 221 Cal.App.3d 161 and *People v. Lee* (1994) 24 Cal.App.4th 1773 (*Lee*) extended the concept of what constitutes the burning of a structure to constitute arson to include a permanent attachment to a structure. In *Jesse L.*, there was minor charring of the floor and door together with melted light fixtures. (*Jesse L.*, at p. 168.) In *Lee*, the fire burned wall-to-wall carpet and the carpet padding below. (*Id.* at p. 1778.) Both of these cases hold arson may be committed by burning something permanently attached to a building that was an integral part of the structure.

Here, Verdugo contends no part of the Outliers structure was burned, but only "the paint had bubbled and burned." Asserting, "[p]aint cannot be considered a fixture like light fixtures or wall-to-wall carpeting," Verdugo contends burning paint on a metal door is insufficient to meet the burning element for arson.

Viewing the evidence in the light most favorable to the judgment, there was sufficient evidence to show the burn element of arson was satisfied. Paint adhering to an exterior door is at least as integrated into a structure as is wall-to-wall carpet attached to a floor with spike strips or glue. (*Lee, supra,* 24 Cal.App.4th at p. 1778 ["evidence the wall-to-wall carpeting in this case was burned by the fire is ample evidence of arson"].) Here, from the photographic evidence, the jury could reasonably determine the physical integrity of the paint on the exterior door and door jamb near the lock was destroyed by fire. The surveillance video shows Verdugo holding the propane torch's flame on the door for about four minutes. Samuel B. testified the fire did not merely discolor the paint, but burned it. It was not just "smoke damage" that could be cleaned.

This evidence is sufficient to support a finding that Verdugo "set[] fire to or burn[ed] . . . any structure" within the meaning of section 451. He burned the paint, which was an integral part of the metal door. (See *Fulford v. State* (Md.App. 1969) 8 Md.App. 270, 273 [259 A.2d 551, 553] [arson conviction upheld where defendant's homemade fire bomb burned the paint off a metal window frame, the court noting, "While it was a metal frame, the paint had been burned completely off."]; *Robinson v. State* (Ala.App. 1971) 47 Ala.App. 51, 53 [249 So.2d 872, 874] [arson of a structure constructed of glass and metal upheld because "calking between metal and glass portions" burned].)[6]

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6 The court also instructed the jury on attempted arson as a lesser included offense of arson. Thus, if the jury believed Verdugo had not set fire to or burned the structure, it was able to convict of the lesser offense.

## II. *NO AUTOMATIC REDUCTION UNDER PROPOSITION 64*

On count 10, the jury convicted Verdugo of possessing marijuana for sale in violation of Health and Safety Code section 11359, a felony. When Verdugo committed this crime and when the court sentenced him, a violation of this statute was punishable under section 1170, subdivision (h) by imprisonment for 16 months, two years, or three years. In July 2016 the court sentenced Verdugo to a consecutive sentence of one year four months on count 10, which is one-third of the two-year midterm, doubled for the strike prior.

After sentencing, the electorate passed the Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64, which amended Health and Safety Code section 11359 to provide, generally, that "[e]very person 18 years of age or over who possesses marijuana for sale shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment." (Health & Saf. Code, § 11359, subd. (b).)[7]

Relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Verdugo contends the amendment to Health and Safety Code section 11359 should be applied retroactively to automatically reduce his conviction on count 10 to a misdemeanor. In *Estrada*, the California Supreme Court held that when a statute that is silent as to whether it operates prospectively or retroactively reduces the penalty for a particular crime, courts will

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7 There are exceptions to the general rule, but the Attorney General states none applies here. (Health & Saf. Code, § 11359, subds. (c)-(d).)

presume the "new lighter penalty" will apply "to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.)

Verdugo's reliance on *Estrada, supra,* 63 Cal.2d 740 fails, however, because Proposition 64 is not silent on the question of retroactivity. Rather, Health and Safety Code section 11361.8 expressly addresses retroactivity by restricting the availability of the reduced criminal penalties to only those inmates who do not pose an unreasonable risk of danger to public safety, providing in part:

> "(a) A person currently serving a sentence for a conviction . . . who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . in accordance with Section[] . . . 11359 . . . as . . . amended or added by that act. [¶] (b) Upon receiving a petition under subdivision (a), the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid *unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety*." (Italics added.)

In *People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*), the California Supreme Court considered whether, under *Estrada, supra,* 63 Cal.2d 740, the Three Strikes Reform Act of 2012, commonly known as Proposition 36, applied retroactively to persons whose judgments were not yet final. Proposition 36 amended the Three Strikes law to reduce the penalty for some third strike offenders when the third strike is not a serious or violent felony. It also enacted section 1170.126, which created a

postconviction procedure where an inmate presently serving a third strike sentence for a crime that was not a serious or violent felony may petition to recall his sentence and be resentenced as a second strike offender. Under that statute, the court may not resentence if the inmate's early release would pose an "unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

The inmate in *Conley, supra,* 63 Cal.4th 646 argued that he was entitled under *Estrada, supra,* 63 Cal.2d 740 to the reduced penalty because his judgment was not yet final and, therefore, he did not need to file a recall petition under section 1170.126. (*Conley, supra,* 63 Cal.4th at pp. 655-656.) The Supreme Court rejected that argument because Proposition 36 was not silent on the question of retroactivity. Moreover, the *Conley* court stated that by making resentencing available only when the inmate's early release would not pose an unreasonable risk of danger to public safety, the electorate intended "to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety." (*Conley,* at pp. 658-659.) Thus, there was no basis for conferring an automatic entitlement to resentencing for inmates whose cases were pending on appeal. (*Id.* at p. 659.)

In *People v. Rascon* (2017) 10 Cal.App.5th 388 (*Rascon*), the appellate court considered the same issue Verdugo presents here. The *Rascon* court determined that the analysis in *Conley, supra,* 63 Cal.4th 646 applies with equal force to Proposition 64 because Proposition 64, like Proposition 36, is not silent on the question or retroactivity, but instead provides for a procedure analogous to Proposition 36's procedure—restricting

the availability of reduced penalties to those who do not pose an unreasonable risk of danger to public safety. (*Rascon*, at p. 394.) *Rascon* therefore holds that "a person sentenced prior to the enactment of Proposition 64 for violating Health and Safety Code section 11359 whose judgment is not yet final is not automatically entitled to the reduction of punishment provided by the amendment to that statute." (*Rascon, supra,* at p. 395.)

The reasoning in *Rascon, supra,* is persuasive. Verdugo is not entitled to an automatic reduction in his conviction in count 10 to a misdemeanor. He may seek that relief in the trial court by appropriate petition under Health and Safety Code section 11361.8.

## III. *SENTENCING ERRORS*

### A. *The Court Should Have Stayed the Sentence for Attempted Burglary*

Section 654 prohibits multiple punishments for an indivisible course of conduct that has a common intent and objective, even though the conduct in question violates more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208.) The statute does not apply if the defendant had "separate, although sometimes simultaneous, objectives . . . ." (*Id.* at p. 1212.) A defendant's intent and objective are factual questions and the trial court's determination will be upheld if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Here, at sentencing, the court imposed consecutive sentences for arson and attempted burglary, stating, "[T]he crimes and their objectives were independent of each other and were committed at separate times and places." Verdugo contends this finding

is not supported by substantial evidence because the arson and attempted burglary were committed at the same time and place, and with one objective—to break into and enter Outliers to steal. Accordingly, Verdugo contends that under section 654, the court should have imposed sentence only for the greater of the two offenses (arson), and the eight-month sentence for attempted burglary should have been stayed.

The Attorney General concedes the court erred in not staying the sentence for attempted burglary, stating: "[T]his matter should be remanded to the trial court with directions to impose a consecutive term on count 8 [arson] and stay sentence on count 9 [attempted burglary]." We accept the Attorney General's concession.

We direct the trial court to stay execution of Verdugo's eight month sentence on count 9 (attempted burglary), under section 654. (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1219 ["The proper remedy for failing to apply section 654 is to stay the execution of the sentence imposed for the lesser offense . . . ."].)

B. *The $97,200 Restitution and Parole Revocation Fine is Excessive*

The court imposed a restitution fine in the amount of $97,200 and a parole revocation fine in the same amount. Under section 1202.4, subdivision (b), the maximum restitution fine is $10,000, "regardless of the number of victims or counts." (3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 111, p. 195.)[8] A court has "no

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8 Section 1202.4, subdivision (b) provides in part: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a

statutory authority to impose a restitution fund fine exceeding $10,000." (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1191, fn. 14.) And, when a parole revocation fine is appropriate, it is to be set in the same amount as the restitution fine. (§1202.45.)

Verdugo contends the $97,200 restitution fine, as well as the parole revocation fine in the same amount, is unauthorized. Verdugo asserts it is "not clear" whether the court intended to impose the maximum fine or some other lesser amount, and therefore he contends the case should be remanded to allow the trial court to impose an amount less than $10,000.

The Attorney General agrees the fines cannot exceed $10,000 each, but asserts the matter should be remanded with directions to reduce the fines to the maximum $10,000 amount.

We agree with the Attorney General's position on this issue and reject Verdugo's request for a remand to see if the trial court would impose fines less than the $10,000 maximum. None of Verdugo's convictions are being reversed in this appeal. Because the court sought to impose fines exceeding $97,000, under these circumstances it is inconceivable that on remand the court would impose anything less than the $10,000 maximum. Accordingly, we will order the judgment modified to reduce the restitution fine and parole revocation fine to $10,000 each.

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felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000)."

## DISPOSITION

Verdugo's convictions are affirmed. The judgment is modified to stay execution of the eight-month sentence on count 9 under section 654. The judgment is also modified to strike the imposition of a $97,200 restitution fine and parole revocation fine in the same amount, and to instead impose a $10,000 restitution fine and a $10,000 parole revocation fine. The trial court is also directed to correct the abstract of judgment to reflect that on count 9, the "Section No." should be that for attempted burglary (§§ 664, 459).

The trial court is directed to prepare an amended abstract of judgment to reflect the corrected sentence, and send a copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.